Press of Fremont Payne, Inc.
[26593]

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 337

ARMAND TOKATYAN,

Petitioner,

against

MAX CHOPNICK,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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LOUIS L. GARRELL,
On the Brief.

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Opinion Below

The opinion of the Circuit Court of Appeals is reported in 128 F. (2d) 521.

Reasons for Denying the Writ

1. The issue raised does not involve any question of such general importance as to justify or merit review by this court.

2. There is no conflict of decisions among the various Circuit Courts of Appeal on any clear cut issue involving any principle of law calling for a definite formulation by this court for uniform application by the Federal courts.

Statement

On November 12, 1940, petitioner filed a petition in bankruptcy. He was at the time indebted to the respondent in the sum of $3,375 and listed the respondent in his bankruptcy schedules as one of his creditors.

A trustee in bankruptcy was appointed. Hearings and examinations were had by the Referee and Trustee in the course of the bankruptcy proceeding.

An action had been commenced by respondent in the City Court of New York against the petitioner to recover the moneys due him. The petitioner secured a stay of further prosecution of this action.

On the application of the petitioner for a discharge, specifications of objections were filed against discharge. The bankrupt had previously, and on February 20, 1935, received a discharge in a former bankruptcy proceeding, and this was one of the grounds of objection to his discharge in the second proceeding. The petitioner's application for a discharge was denied by an order of the Referee made June 19th, 1941, and this order was affirmed on petition to review, which came on to be heard before the Hon. John W. Clancey, District Court Judge. An order thereon was made on August 12th, 1941.

On October 18th, 1941, petitioner instituted a third bankruptcy proceeding and again immediately secured an *ex parte* order staying respondent from the prosecution of the action pending in the City Court.

For almost a year, the petitioner secured stays to enjoin the prosecution of the City Court action and the respondent was unable to proceed to reduce the debt, admittedly due, to judgment. During the period that these stays were secured by the petitioner, the petitioner earned substantial sums, no part of which was ever applied against his debt.

In the third bankruptcy proceeding, the respondent moved to vacate the *ex parte* order restraining him from

prosecuting his action. This motion was denied by the District Court. On appeal, the order was reversed and the stay vacated.

It is respectfully submitted that this decision was entirely proper and presents no question warranting review by this Court.

POINT I

The provisions of Sec. 11(a) of the Bankruptcy Act clearly required that the *ex parte* stay secured by the petitioner in his third bankruptcy should be vacated.

Sec. 11(a) of the Bankruptcy Act, enacted in 1938, after authorizing a stay of pending suits upon claims which would be released by a discharge, provides "that such stay shall be vacated by the Court if, within six years prior to the date of filing of the petition in bankruptcy, such person has been adjudicated a bankrupt".

The language of this section is clear and unambiguous. The petitioner here having been adjudicated a bankrupt on Nov. 12, 1940, the stay which he procured on Oct. 18th, 1941, manifestly should have been vacated. The order of the District Court denying the respondent's motion to vacate was, in the language of the Circuit Court, "flat in the teeth of this provision".

The District Court erroneously regarded the denial of the discharge in the second proceeding as rendering the whole second proceeding a nullity, including the petitioner's adjudication as a bankrupt (Rec. 41). As the Circuit Court very properly stated, there is no "statutory provision or legal principle which annuls an adjudication because a discharge is denied, whatever the ground for denial".

The reversal by the Circuit Court gave effect to the clear mandate of Sec. 11(a) of the Bankruptcy Act.

POINT II

Aside from the express provisions of Sec. 11(a) of the Bankruptcy Act, the Circuit Court properly held that the stay should have been vacated because the debt was no longer dischargeable.

The debt of respondent was listed in the second bankruptcy.

The petitioner applied for a discharge in this proceeding and following specifications and objections against this application and a hearing on the merits, an order was duly made denying the petitioner a discharge. This denial of a discharge by the Referee was affirmed by order of the District Court, and thus became *res judicata* with respect to the debt sought to be discharged.

It is well settled that a bankrupt cannot discharge a debt which was scheduled in a prior bankruptcy proceeding in which a discharge has been denied (*Freshman* v. *Atkins,* 269 U. S. 121; *In Re Schwartz* 89 Fed. (2d) 172 (C. C. A. 2d, 1937); *In Re Zeiler,* 18 Fed. Supp. 539; *In Re Gilson,* 12 Am. B. Rep. (n. s.) 325; *In Re Summer,* 107 Fed. (2d) 396 (C. C. A. 2d, 1939); *Perlman* v. *322 W. 72nd Street Co.,* 127 Fed. (2) 716 (C. C. A. 2d, April 11, 1942)).

The granting or denial of a discharge is an adjudication between the bankrupt and all parties duly scheduled or having notice amounting to *res judicata* that no other Court will allow to be impeached. *Blumenthal* v. *Jones,* 208 U. S. 64; *Matter of Feigenbaum* (C. C. A. 2) 121 Fed. 169; *Kuntz* v. *Young* (C. C. A. 8th) 131 Fed. 719; *Pollet* v. *Casel* (C. C. A. 1st), 179 F. 488; *Matter of Longham* (C. C. A. 3rd) 218 Fed. 619; *Bacon* v. *Buffalo Cold Storage Co.* (C. C. A. 5th), 193 Fed. 34; *In Re McCausland,* 9 Fed. Supp. 129 (S. D. Cal.), appeal dismissed 79 Fed. (2) 1001.

If we understand the petitioner's argument correctly, it is that the principle of *res judicata* should be here discarded; that instead of giving effect to a formal order denying a discharge as a final and conclusive adjudication, we should look behind the order to see what were the grounds therefore; and that it be determined from these grounds whether the final order is or is not to be deemed a binding adjudication. We respectfully submit that this argument finds no support in law. None of the cases which the petitioner cites support his argument nor are they applicable to the facts in this case.

As said by the Circuit Court: "We know of no statutory provision or legal principle which annuls an adjudication because a discharge is denied, whatever the ground for denial".

The Circuit Court in its opinion below held that the denial of the discharge because of a previous discharge within six years, as in the case at bar, or on some other ground specified in Sec. 14 of the Bankruptcy Act, barred an application in a subsequent bankruptcy proceeding for discharge from the same debts on the principle of *res judicata*. In this view the Circuit Court's opinion is sustained by the authorities.

In Re McCausland, 9 Fed. Supp. 129 (S. D. Cal.), appeal dismissed 79 Fed. (2) 1001, the facts were identical to those present in the case before this Court. There a creditor filed objections to the granting of a discharge on the ground that the bankrupt had been denied a discharge in a prior voluntary proceeding for the reason that such proceeding was instituted within six years of a prior bankruptcy proceedings. The creditor asserted that the denial of the discharge in the intermediate bankruptcy proceeding was *res judicata* with respect to the debts therein scheduled. The Court said:

> "This position seems to be thoroughly sustained by the authorities. Counsel for the bankrupt has en-

deavored to draw a distinction as to the effect of the refusal to grant the discharge where such refusal has been ordered merely because a prior discharge had been allowed within six years, as differing from a case where the discharge has been denied because of some fraudulent act or other condition specified in the Bankruptcy Act (§ 32, Title 11, U. S. C. A.) (Now § 14, Sub. C.). I have made a search of the law in an endeavor to find whether such a distinction may be applied and am unable to find anything which supports it. The rule of *res adjudicata,* as applied to an order refusing a discharge, seems applicable in all cases, regardless of whether there has been any misconduct on the part of the bankrupt. For instance, a bankrupt may fail to apply for a discharge within the time specified in the Bankruptcy Act. He may be guilty of no fraud in that regard, but merely have been neglectful in prosecuting the proceeding. Yet it is held in such cases, where he later petitions for a discharge in a new proceeding, he is not entitled to any order which will relieve him of the debts provable in the prior proceeding. Cases to this point are: *Kuntz* v. *Young,* 131 Fed. 719 (C. C. A. 8th); *In Re Weintraub,* 133 Fed. 1000 (D. S. N. J.); *In Re McMorrow,* 52 Fed. (2d) 643 (D. C. W. D. N. Y.)."

The debt being no longer dischargeable, the granting of a stay was improper and prejudicial and should have been vacated (*In Re Feifer,* 22 Fed. Supp. 541; *In Re Ridder,* 79 Fed. (2d) 524 (C. C. A. 2d).

The cases on which petitioner relies are clearly distinguishable factually from the case at bar and from the facts *In Re McCausland, supra.* In none of these cases was there a bankruptcy proceeding which ran its full course and which resulted in a final order denying a discharge. Thus, in *Prudential Loan & Finance Co.* v. *Robarts,* 52 Fed. (2d) 948 (C. C. A. 5), a discharge was never applied for and the proceeding was closed by the court. In *Matter of Dierck,* 37 Am B. Rep. (n. s.) 198 (S. D. N. Y.), a discharge was never applied for. *In Re*

Simmerly, 38 Am. B. Rep. (n. s.) 425 (N. D. Ohio), the proceeding was dismissed. So, in none of these cases relied on by the petitioner was there a final order denying the discharge, and consequently the principle of *res judicata* was in no way involved.

This distinction is pointed out *In Re Perry,* 50 Fed. (2d) 464. There the bankrupt obtained a discharge in his bankruptcy proceeding. He filed a second petition within six years, but this proceeding was dismissed. He later filed a third petition. Objections to his discharge were interposed by creditors whose debts had been scheduled in the intermediate bankruptcy proceeding. The court granted a discharge, stating, however, that had there been a denial of a discharge, it would have held otherwise, as appears at page 464:

> "If the proceedings in the second case had not been dismissed, and the bankrupt *had been denied a discharge,* or had failed to apply for a discharge, then the grounds set out by the objecting creditors would be good, and no discharge could be granted in this case as to their debts. *In Re Bacon,* 193 Fed. 34 (C. C. A. 5th): (Cert. Den. 225 U. S. 701):
>
> "It appearing from the above, however, that the second case was dismissed, and that such dismissal carried the entire proceeding out of court, with the same effect as if same had not been filed, such dismissal proceedings could not constitute *res adjudicata* as to the debts scheduled therein, especially in view of the fact that, not only were all the proceedings dismissed, but that there were never any proceedings filed by the creditors in the nature of proofs of claim or otherwise." (Italics ours.)

Thus, the authorities relied on by petitioner, cases where the second or intermediate bankruptcy proceeding never progressed beyond the stage of a simple filing of a petition or never resulted in a final order of discharge, are clearly distinguishable, on the facts, from the case under review, where, after a full hearing, the proceedings re-

sulted in a solemn and undisturbed order denying the bankrupt's application for a discharge of all the debts scheduled in such proceedings.

Furthermore, even if we regard the language of the court in the case of *Prudential Loan & Finance Co.* v. *Robarts, supra,* as indicating a view contrary to that adopted by the Circuit Court below, the view of the Circuit Court below presents no conflict of authority for the following reasons:

1. If, as indicated by the quotation from the *Prudential* case (Pet.'s Br., p. 4), a refusal of discharge because of a prior discharge is claimed to stand on a different footing because no reprehensible conduct is involved, then two immediate objections to this argument are evident. In the first place, there is nothing in the Bankruptcy Act which establishes a different rule of construction of an order denying a discharge because such order was made on one or another of the grounds specified in Sec. 14 of the Act. Had Congress desired to place a refusal of a discharge for one ground on a different footing from a refusal of a discharge on another ground, it could very well have so provided in the Act. But there is no such provision. If, indeed, a consideration of reasons was required as to every order denying a discharge, there would be no finality to such an order without an examination of the grounds upon which such order was predicated. A failure to apply for a discharge, as occurred in the *Prudential* case, might well have led the Court to regard the matter as one which, strictly speaking, did not involve a judicial determination to be respected under the principle of *res judicata.* Secondly, as noted before, the facts in the case under review differ, in that there has here been a full determination leading to a due final order. Moreover, if reprehensible conduct be the test of the *Prudential* case, then the order denying a discharge in the intermediate proceeding should be deemed a bar to

an attempt to secure a discharge in the third bankruptcy, for the facts clearly demonstrate such a course of conduct on the part of the bankrupt as to be properly called reprehensible. The record shows that the petitioner gained all the benefits and advantages accruing to an adjudicated bankrupt, secured successive stays thus gaining immunity from judgment for a period of approximately one year, and this course of conduct was manifestly preconceived and deliberate and was nothing short of toying with the court's processes, to frustrate the petitioner's creditors. Procedure of this questionable character, prompted by the desire to deliberately evade obligations and carry over beyond the six-year period from the first discharge, should not be condoned.

2. As said by the Court below, whatever the correct rule may have been prior to the amendment of Sec. 11(a), the amendment makes clear that the adjudication in the bankrupt's 1940 proceeding precluded the stay granted on his 1941 petition.

Under the present statute, there is no conflict as between the *Prudential* case, and the decision in the instant case. And the settled doctrine of *res judicata* is, in any case, applicable upon the facts in the instant case.

POINT III

No question of general importance and no conflict of decisions of the various Circuit Courts on a clear cut issue involving a general principle of law meriting the consideration of this Court, has here been shown.

It is respectfully submitted that there is no general principle of law involved in the instant case of such importance and of such a character as to warrant the consideration of this court. Nor has it been shown that there exists any such conflict of decisions on a clear-cut

issue involving a general principle of law, of a nature requiring a definite formulation by this court of a principle for uniform application by the Federal Courts.

The only Circuit Court decision claimed by the petitioner to have involved a different view from that taken by the Circuit Court in the instant case, was decided prior to the amendment of Sec. 11(a) of the Bankruptcy Act and any difference that might have been said to have existed prior to such amendment, as between the two decisions, is no longer arguable.

The thorough examination and consideration of the issues in the instant case by the Circuit Court are clearly evident from its opinion. Its decision is entirely supported by and in keeping with the statute and the well-established rules of law governing the situation here present.

CONCLUSION

The application for writ of certiorari should be denied.

Respectfully submitted,

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